QUARTERLY REPORT

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The **Quarterly Report** provide information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676 or contact him by e-mail at <kmcdowel@doe.state.in.us>.

In this report:

SUICIDE THREATS AND CRISIS INTERVENTION PLANS

The Indiana State Board of Education recently published its proposed rules for school-based student services. One of the proposed rules addresses the creation of crisis intervention plans that are to be coordinated with emergency preparedness plans. The proposed rule reads as follows:

> **511 IAC 4-1.5-7 Crisis Intervention Plans**
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> Each school corporation shall, in concert with the emergency preparedness plan developed under 511 IAC 6.1-2-2.5,[1] develop a crisis intervention plan for the school corporation and for each school in the school corporation. The plan, which should be developed by student services personnel in conjunction with school administrators and community crisis intervention personnel, shall include crisis management and intervention provisions.

One area of particular concern is student suicide. Threats of suicide by students are increasing.[2] U.S. Surgeon General David Satcher has declared suicide "a serious national threat" and "a serious public health problem" (*Indianapolis Star*, July 29, 1999). Suicide is the eighth-leading cause of death in America, claiming about 30,000 lives each year, with another 500,000 Americans attempting suicide but surviving.[3] On average, according to the U.S. Public Health Service's *The Surgeon General's Call to Action to Prevent Suicide* (1999), 85 Americans commit suicide every day. Although more females attempt suicide than males, males are at least four times more likely to die from suicide. "For young people 15-24 years old, suicide is currently the third-leading cause of death, exceeded only by unintentional injury and homicide. Suicide is currently the fourth-leading cause of death among children between the ages of 10 and
14 years of age. Dr. Satcher added that parents, teachers and others who interact with people at risk of suicide often do not realize they can help. He plans to distribute a PBS video *"Depression: On the Edge"* to school counselors to help them detect student depression.

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[1]See "Emergency Preparedness and Crisis Intervention," **Quarterly Report** October-December: 1998. This article included the report on St. Matthew's response to an anthrax scare. The parochial school initiated emergency preparedness and crisis intervention plans and procedures initially in response to a student suicide threat.

[2]See "Suicide: School Liability," by Dana L. Long, Legal Counsel, Indiana Department of Education, in **Quarterly Report** July-September: 1996, portions of which are incorporated into this article.

[3]By way of comparison, there are fewer than 19,000 homicides each year in the United States.

The Indiana Department of Education, on August 12, 1999, distributed over 2,500 copies of comprehensive materials developed by a number of agencies and persons, including the Department of Education, as a means of promoting safer schools and assisting schools in developing and implementing emergency preparedness and crisis intervention plans. One of the entities participating was the Mental Health Association in Marion County, Indiana, which stressed the need for public awareness of teenage suicide and the concomitant need for schools to be aware of the signs of students at risk of attempting suicide. The Department has unveiled its comprehensive checklist for emergency preparedness and crisis intervention. The Department also created a web site at **http://doe.state.in.us/safeschools** that contains a great deal of information, including the aforementioned "checklist." The site contains two sample school policies that are comprehensive in their treatment of emergency preparedness but less so with respect to crisis intervention. Suicide is not addressed specifically.

Crisis intervention plans addressing threats of student suicide should consider certain legal requirements. Although many public school districts and nonpublic schools already have contingency plans or procedures to address threats of suicide by students, these vary widely in construction, community involvement, effectiveness, and reasonableness. Many lack sufficient administrative protocols for documenting or reporting such incidents.

The following are established or emerging legal requirements that may influence and affect crisis intervention plans in Indiana, especially with respect to student suicide threats.

Ordinarily, a state's failure to intervene to prevent harm to an individual by a private actor is not a constitutional violation. See DeShaney v. Winnebago County, 489 U.S. 189, 109 S.Ct. 998 (1989). Under common law, inaction rarely gives rise to liability unless some special duty of care exists. *Restatement (Second) of Torts,* §314 and comment (1965). The main exceptions to this proposition are prisoners and involuntarily committed mental patients. Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976); Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452 (1982). Although children are required to attend school, this compulsory attendance does not make such children "captives" of school authorities. As the Supreme Court noted in Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655, 115 S.Ct. 2386 (1995): "[W]e do not, of course, suggest that public schools as a general matter, have such a degree of control over children as to give rise to a constitutional 'duty to protect.'" This is not, of course, an absolute statement of law. In some cases, a school's inaction, indifference, or deliberate action may result in tort actions, constitutional violations, and resulting liability, especially under two prevailing theories: Special Duty and Danger Creation.

Special Duty Theory

The Indiana Supreme Court recently addressed "special duty" and the application of the Indiana Tort Claims Act (ITCA), albeit with respect to the suicide of an inmate. In Sauders v. Steuben Co., 693 N.E.2d 16 (Ind. 1998), the court reversed judgment in favor of the county and remanded the matter to the trial court, finding the absence of audio-visual monitoring equipment in the jail relevant to a determination of whether the county breached a duty to protect the inmate. The inmate was actually a

pre-trial detainee, arrested for driving while intoxicated. He was arrested after running into the back of a police car. He was processed and left alone in a two-person cell. He was found between 30-42 minutes later with a noose of blanket strips around his neck. Despite attempts to revive him, he never regained consciousness. The Supreme Court acknowledged that "a custodian, under some circumstances, has a legal duty to take steps to protect persons in custody from harm." This custodian "has the duty to exercise reasonable care to preserve the life, health, and safety of the person in custody. The appropriate precautions will vary according to the facts and circumstances presented in each case." At 18. However, "the custodian does not have a duty to prevent a particular act (e.g. suicide). Rather, the duty is to take reasonable steps under the circumstances for the life, health, and safety of the detainee." Id. This duty is "a duty to take reasonable steps" and does not impose upon the custodian the responsibility to become "an insurer against harm." Id. This duty is one "to protect against unreasonable risk of harm, including specifically self-inflicted harm." At 19, citing to *Restatement (Second) of Torts,* §314A, comment *d* (1965). "If the suicidal tendencies of the inmate are known, the standard of care required of the custodian is elevated." At 19-20. Indiana has by regulation established certain county jail standards. Under 210 IAC 3-1-7(f), county jails are required to have audio-video monitoring of intoxicated pre-trial detainees. The Steuben County jail did not have such monitoring devices. Although there is not a duty to provide the equipment for any particular inmate, including the decedent, and the absence of such equipment is not evidence of negligence, the jury should have been afforded the opportunity to consider the absence of such monitoring equipment in evaluating whether the county exercised "reasonable care under the circumstances." At 21. A new trial by jury was ordered. At 22. The Chief Justice dissented, warning that the majority's decision "will ineluctably shift liability away from those who suffer harm from their own intentional acts and impose it on those who are only negligent." At 22. Although the dissent did not address schools, it did warn that the "bottom line" of the majority opinion is "that custodians have a specific duty to prevent self-harm and that their charges have no duty at all to care for themselves." At 22-23.

Special Duty: Partial Disclosure

In Grant v. Bd. of Trustees of Valley View School District No. 365-U, 676 N.E.2d 705 (Ill. App. 1997), the court determined the school employees were immune from liability, finding no "special duty" or "special relationship" existed as to a student who committed suicide after being released to his mother. The student had expressed suicidal intentions at school, including writing notes to this effect. When the school contacted the mother, she was advised to take him to a hospital because of possible overdose. The mother was not advised of the suicide threats. The student jumped from her car and eventually died when he leapt from an overpass. The court noted that the "special duty" doctrine arose as an exception to the common law principle that governmental entities are generally not liable in tort to members of the general public for failure to enforce local ordinances or for their negligent exercise of governmental authority (such as in providing police and fire protection). Although Illinois law permits school districts to establish crisis intervention programs, including suicide intervention programs, such programs are not mandated. Because school officials stand *in loco parentis* (see *infra*), they have immunity from liability for negligence unless the injured party can demonstrate wilful and wanton misconduct. The latter is intentional conduct or conduct that demonstrates a "conscious disregard or

indifference for the consequences when the known safety of other persons is involved." The mother would have to demonstrate in this case that school officials had actual or constructive knowledge that their conduct posed a high probability of serious physical harm to others. Although the court stated that "[s]chool counselors and other school personnel should take every suicide threat seriously and take every precaution to protect the child," the school did take some action (calling the mother). Although the nondisclosure of the student's suicide threats may constitute negligence, without a showing of wilful or wanton misconduct, the school officials enjoy immunity from liability. The Illinois decision is not unanimous. The dissenting judges felt that the school's nondisclosure of the student's suicide threats amounted to wilful and wanton misconduct because such withholding of information amounts to a conscious disregard or indifference for the student's safety, and the school officials should have known that their conduct posed a high probability of serious harm to the student.

Special Duty: Epidemic Effect

Hasenfus v. LaJeunesse, 175 F.3d 68 (1st Cir. 1999), involved a 14-year-old middle school student who a year earlier had been raped and was scheduled to testify against her attacker. During a physical education class, she was being harassed by other students about the impending trial. She began shouting at the other students and was sent out of the class and to the locker room by the teacher. She hanged herself, but was discovered before she died. Nevertheless, she did suffer permanent impairments. There had been seven other attempted suicides in the middle school in the three months prior to this student's attempt. Although there was no showing the physical education teacher was aware of the student's rape incident, he was married to the school nurse who did know. The court rejected that the "epidemic" of suicide attempts altered the school's relationship to the student such that the school had an affirmative duty to protect the student entrusted to its care. The court also rejected the teacher's conduct of sending this student to the locker room unattended created liability under the "Danger Creating" theory (see *infra*). The purported knowledge of the school nurse was not imputed to the physical education teacher. Other than the teacher, the school's inaction in addressing the "rash of attempted suicides" at the middle school would be negligence for which there would be no liability under the State's tort claim act. The court added that the mere fact school officials stand *in loco parentis* does not raise a special duty because attendance at school, although compulsory under State law, does not make "school children...[the] captives of the school authorities." At 71. The court noted at 72 that they were "loath to conclude now and forever that inaction by a school toward a pupil could never give rise to a [constitutional] violation." Although the Supreme Court in Vernonia, *supra*, stated that, "as a general matter" schools do not have a "duty to protect," there are, nevertheless, a narrow range of circumstances where there might be a "specific duty" if not a "special duty." The court provided several examples where liability might attach where school officials were deliberately indifferent to the emergency medical needs of injured students.[4] Usually, the conduct is evaluated under the "shock-the-conscience rubric" and usually involves "egregious behavior" on the part of school

[4]But see "Do Not Resuscitate Orders and Public Schools," **Quarterly Report** July-September: 1999.

officials. At 72. "Attempted suicide by school-age children is no slight matter; but it has no single cause and no infallible solution.... Absent a showing that the school affirmatively caused a suicide, the primary responsibility for safeguarding children from this danger, as from most others, is that of their parents[.]" At 73. In this case, school officials in general—and the teacher in particular—did not engage in conduct that could be considered malicious or in any way that would "shock the conscience." Id. "The federal courts have no general authority to decide when school administrators should introduce suicide prevention programs, or whether an unruly or upset school child should be sent out of class, or what should be said to other parents about a tragic incident at school." This is a matter for legislative bodies. At 74.

Special Duty: Attendance Policies

In McMahon v. St. Croix Falls School Dist., 596 N.W.2d 875 (Wisc. App. 1999), the parent drove the student to high school, but the fifteen-year-old student did not attend classes that day. Apparently, the student had received five failing grades, had been removed from the basketball team, and had been observed in school as upset and, at times, crying. The student was later found by a classmate in a garage where he had doused himself with gasoline and died from self-immolation. The school had a policy that if a student is absent from school, the school will call the parents at home or work to verify the absence. This did not occur. The parents filed a wrongful death action against the school, but the court granted summary judgment to the school. The appellate court affirmed the dismissal. The appellate court noted that to establish a negligence case, the parents must show: (1) the school had a duty of care; (2) the school breached that duty; (3) there is a causal connection between the conduct and the injury; and (4) damage resulted from the injury. At 879. However, in this case, the student's suicide is "an intervening force which breaks the line of causation from the wrongful act to the death, and therefore the wrongful act does not render the [school] civilly liable." Id. " [T]he doctrine of intervening and superseding cause[5] is another way of saying the negligence is too remote from the injury to impose liability[.]" Id., at 880. Reasonable foreseeability is a factor in the legal analysis. Where a suicide results from a "moderately intelligent power of choice, even if the choice is made by a disordered mind, the suicide is a new and independent cause of death that immediately ensues." Id. An exception to this general rule is where a defendant's negligence or wrongful act creates in the deceased an "uncontrollable impulse, a delirium, frenzy or rage, during which the deceased commits suicide without conscious volition to produce death. This exception recognizes a cause of action in which the defendant actually causes the suicide." Id., internal punctuation and citations omitted. Although the parents argued an *in loco parentis* exception to the general rule, the court declined to accept that a "special relationship" existed between the school and the student so as to impose a higher duty of care on the school. "Special relationships are typically custodial or at least supervisory, such as the relationship between doctor and patient, jailer and inmate, or teacher and student." At 881, citing in part to Brooks v. Logan, *infra.* "Jurisdictions adopting the special relationship exception to [the]

[5]The court defined "superseding cause" as "an intervening force that relieves an actor from liability for harm that his negligence was a substantial factor in producing." Id., at 879-80.

general rule in the school-student context have held that the intervening and superseding cause doctrine is inapplicable when the suicide resulted from the district's alleged failure to exercise due care to protect its students." Id. Wisconsin has not adopted such an exception, however, and the court refused to adopt an exception—beyond the uncontrollable impulse rule—that would impose liability on a school based upon a "special relationship" based upon a premise that unexplained absences of minor children can reasonably lead to harm, and that school districts charged with the care of minors should reasonably foresee that such harm will occur. The suicide of the student was not foreseeable, nor was it a reasonably foreseeable consequence of an unauthorized absence from school.

Danger-Creation Theory

The "Danger-Creation" theory imposes liability upon State actors where an individual's safety is directly jeopardized by State action. The leading student-suicide case applying this doctrine is Armijo v. Wagon Mound Public Schools, 159 F.3d 1253 (10th Cir. 1998).[6] Armijo was a 16-year-old student with significant learning disabilities, including psychological and emotional problems manifested by impulsivity and depression. His Individualized Education Program (IEP) included consultations with a social worker in order to deal with school and self-esteem issues. The school was aware that Armijo had access to firearms in his home. He often articulated suicide threats. These usually involved shooting himself. One day the principal reprimanded Armijo. His response was to become threatening. The principal suspended him on an emergency basis, ordering the school counselor to drive him home. The principal did not follow school policy with respect to special education students nor for students generally, especially where the student's parents are not home. No one notified Armijo's parents, nor did the school counselor check at Armijo's home when he dropped him off. Armijo was later discovered by his parents in their bedroom, dead from a self-inflicted gunshot wound to his chest. The court acknowledged that governmental officials performing discretionary functions enjoy qualified immunity from liability under 42 U.S.C. §1983 (see *infra*). It is "qualified" in the sense that it would not provide protection "when otherwise immune officials violate clearly established statutory or constitutional rights of which a reasonable person would have known." At 1260. State actors are liable for their own acts and not the violent acts of others, although there are two exceptions to this general rule: the "special relationship" doctrine and the "danger-creation" doctrine. Id. An individual must show "involuntary restraint by a government official in order to establish a duty to protect under the special relationship theory." As noted previously, "[c]ompulsory attendance laws for public schools...do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school....
Inaction by the state, in the face of a known danger, is not enough to trigger a constitutional duty to protect unless the state has a custodial or other 'special relationship' with the victim." At 1261. Under the "danger creation" doctrine or theory, state officials can be liable for the acts of third parties

[6]The 1st Circuit Court of Appeals in Hasenfus, *supra*, disparaged the 10th Circuit's decision in Armijo, referring to it as "at the outer limit," questioning the legal soundness of applying "Danger Creation" to a school-based suicide. The 1st Circuit did acknowledge that the facts in Armijo are substantially more aggravated than in its dispute. See Hasenfus, 175 F.3d at 74.

where those officials created the danger that caused the harm. The conduct must be reckless or intentional injury-causing that "shocks the conscience." At 1263. In order to satisfy the "shock the conscience" rubric, the plaintiff will have to demonstrate "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." Id. The court utilized a five-part test to determine whether a state official has created a special danger: (1) the injured party is a member of a limited and specifically definable group; (2) the government official's conduct put the injured party at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) the government official acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in its totality, is conscience shocking. At 1262-63. In addition to this five-part test, a plaintiff will also have to show that the charged state entity and the charged individual defendant actors "created the danger or increased the plaintiff's vulnerability to the danger in some way. In other words, if the danger to the plaintiff existed prior to the state's intervention, then even if the state put the plaintiff back in that same danger, the state would not be liable because it could not have created a danger that already existed." The State would have to create the dangerous environment, and know such an environment to be dangerous. At 1263. There is a possibility "that a constitutional duty to protect an individual against private violence may exist in a noncustodial setting if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent the state action." Id., citing Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990). In this case, there may be liability on the school actors: (1) Armijo was a member of a limited and specifically definable group (special education students who have expressed suicide threats); (2) the conduct of the principal and the counselor put Armijo at substantial risk of serious, immediate and proximate harm, especially by taking him to an unsupervised home where firearms were known to be kept; (3) school officials knew Armijo was suicidal and distraught, was unable to care for himself, was home alone, and had access to firearms; (4) school officials acted recklessly in conscious disregard of the risk of suicide; and (5) such conduct, when viewed in its totality, could be construed as "conscious shocking." In addition, (6) the conduct of the principal and school counselor increased the risk of harm to Armijo. The principal and school counselor were not entitled to summary judgment, the court found. At 1264.[7]

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[7]Whether or not the development by a public school district of an individualized program for a student with disabilities creates a "special relationship" or "special duty" is an emerging area of law. It appears the degree of disability may heighten a school's responsibility, especially with respect to supervision. The greater the supervision necessary, the more the relationship appears "custodial." See Murrell, *infra.* One recent reported complaint investigation of the Office for Civil Rights (OCR) of the U.S. Department of Education found that a school district did not violate Title II of the Americans with Disabilities Act or Sec. 504 of the Rehabilitation Act of 1973 when it developed an accommodation plan for a student with depression who attempted suicide. The student was required to be accompanied in the school, by a person of her choice, whenever she was not in class. The person of choice was often a fellow classmate, her best friend. See Harlowton (Mt.) Public Schools, 26 IDELR 1156 (OCR 1997).

The following are related areas to the "special duty" and "danger-creation" doctrines. Establishing negligence for schools requires considerably more evidence of deliberate indifference and exacerbation of the situation before liability attaches. The following illustrate general principles.

Tort Claims

Establishing negligence requires a showing of: (1) a duty of care; (2) a breach of that duty through a negligent act or omission; (3) an injury; and (4) a proximate causal relationship between the breach of the duty and the injury.

1. Hoeffner v. The Citadel, 429 S.E.2d 190 (Sup.Ct. S.C. 1993), while dealing with the suicide of a military college student, provides useful guidance on duty, reasonable care, negligence and professional duty:

> The discharge of a duty requires the exercise of reasonable care. *See Hart v. Doe,* 261 S.C. 116, 198 S.E.2d 526 (1973) (negligence is the failure to use that degree of care which a person of ordinary prudence and reason would exercise under the same or similar circumstances). Reasonable care, in the context of professional negligence, requires the exercise of that degree of skill and care which is ordinarily employed by members of the profession under similar conditions and in like surrounding circumstances. *See King v. Williams,* 276 S.C. 478, 279 S.E.2d 618 (1981) (degree of care for a physician is that of an average competent practitioner in the same or similar circumstances). Thus, a professional's duty to prevent suicide requires the exercise of that degree of skill and care necessary to prevent a patient's suicide that is ordinarily employed by members of the profession under similar conditions and circumstances. *Accord Eisel v. Bd. of Education,* 324 Md. 376, 597 A.2d 447 (1991) (school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a student's suicidal intent); *Brandvain v. Ridgeview Institute, Inc.,* 188 Ga.App. 106, 372 S.E.2d 265 (1988), *aff'd,* 259 Ga. 376, 382 S.E.2d 597 (1989) (while there is no duty to guarantee that a patient will not commit suicide, there is a duty to the extent possible under reasonable medical practice to prevent suicide).
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> Further, the question whether the duty has been breached turns on the professional's departure from the standard of care rather that the event of suicide itself. (Citations omitted.)

Hoeffner at 194.

2. Eisel v. Board of Education of Montgomery County, 597 A.2d 447 (Md. 1991), involved a 13-year-old middle school student who became involved in satanism. This involvement led to

her obsession with death and self-destruction. During the week prior to her death, she told several friends and fellow students of her intent to commit suicide. Several students relayed this information to their school counselor who, in turn, advised the student's counselor. Both counselors questioned the girl about the statements, but she denied making them. Neither counselor contacted either the girl's parents or school administrators regarding her statements. Shortly thereafter, she and another girl carried out a murder-suicide pact in a public park on a school holiday. The court recognized that the relation of a school to a student is analogous to one who stands *in loco parentis*, such that the school is under a special duty to exercise reasonable care to protect the student from harm. After considering a number of factors, including foreseeability and certainty of harm, policy of preventing future harm, closeness of connection between conduct and injury, and burden on the defendant, the court held that school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a student's suicidal intent. This duty could include warning the parent of the danger.[8]

3. In Brooks v. Logan, 903 P.2d 73 (Idaho 1995), the parents of a student who committed suicide brought a wrongful death action against a teacher (for failing to warn the parents of potential suicidal tendencies) and the school district (for failing to implement a suicide prevention policy). Jeffrey Brooks, as a part of his English class assignments, was required to make daily entries in a journal. He expressed concern to his teacher, Laura Logan, that he did not feel he could fully express himself if she were reading his entries. She assured him she would check his entries for date and length but not for content. After he committed suicide, Logan read the journal and then turned over the journal to the school counselor. The counselor delivered it to Jeffrey's parents. There were entries where Jeffrey alluded to death or depression, but there was no definite statement that he was contemplating suicide. The Supreme Court of Idaho found that the school district was immune from liability based upon the discretionary function exception for any failure to implement a suicide prevention program, or failure to train its staff in such prevention. Routine, everyday matters not requiring the evaluation of broad policy factors, on the other hand, would likely be considered "operational," and not immune from liability. The teacher's alleged failure to warn the parents did not require an evaluation of financial, political, economic and social effects but rather the exercise of practical judgment. The court, also recognizing the doctrine of *in loco parentis*, stated "there is a duty which arises between a teacher or school district and a student. This duty has previously

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[8]The court remanded the case for trial on the issue of whether school personnel had sufficient knowledge of the girl's suicidal intent so as to be liable for failing to report it. The jury returned a verdict for the school. "Montgomery Schools Win Suicide Pact Lawsuit," *Washington Post* (March 19, 1994). This does not negate the court's decision that there is a duty on the part of school personnel to inform appropriate individuals of a student's suicidal expressions or tendencies when they become known, and that breach of such a duty could form the basis for a negligence claim. Eugene C. Bjorklun, "School Liability for Student Suicides," 106 Ed. Law Rep. 21, 26 (1996).

been recognized by this Court as simply a duty to exercise reasonable care in supervising students while they attend school." Brooks, at 79. The court found that the school district and the teacher, by state statute, had a duty to exercise reasonable care in supervising students and to act affirmatively to prevent foreseeable harm to students. The dispute was remanded to the trial court for a determination as to whether the teacher's failure to notify the parents of the student's suicidal thoughts was a negligent breach of this duty to prevent foreseeable harm and, if so, whether this breach was the proximate cause of the injury. Id., at 80.

Following remand, the trial court entered summary judgment for the school defendants. The parents appealed again to the Idaho Supreme Court. In Brooks v. Logan, 944 P.2d 709 (Idaho 1997), the state supreme court affirmed the judgment in favor of the school defendants, upholding the determination that an ordinary teacher is not under a duty to look for potential suicides, especially in the absence of any actual knowledge of a student's suicidal intentions. The teacher and the school were immune from liability based on the alleged failure to use reasonable care in supervising the student so as to prevent him from committing suicide.

4. Killen v. Independent School District No. 706, 547 N.W.2d 113 (Minn. App. 1996), provides further guidance on discretionary function immunity and official immunity. In this case, a ninth grade student stayed home from school, obtained a gun from her parents' basement, and fatally shot herself in the chest. The student had expressed suicidal thoughts to her guidance counselor five months earlier. The guidance counselor informed the parents and recommended counseling. The parents did obtain counseling. Later, the student wrote an essay for English class where she described a girl committing suicide by shooting herself in the chest. The guidance counselor was advised of this essay, but did not contact the parents. The guidance counselor was also advised by another counselor that a student reported receiving a letter from the girl wherein she described her intentions to commit suicide. The guidance counselor spoke to her about her suicidal statements. She reassured the counselor her suicidal statement was a reaction to an argument with one of her parents and was not a serious statement. She also indicated she was receiving counseling. Her parents were not contacted regarding either the letter or the ensuing conversation. Four days later, she killed herself. The school district had no suicide prevention policy. In affirming the application of discretionary function immunity to the school district's lack of suicide prevention policy and the application of official immunity to the guidance counselor's decision on when to tell the parents that the student expressed suicidal thoughts, the court held:

> Discretionary function immunity protects a government entity from tort liability for a claim based on "the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." The purpose of discretionary function immunity is to preserve the separation of powers by protecting executive and legislative policy decisions from judicial review through tort actions.

> The critical question in determining whether discretionary function immunity applies is whether the specific conduct involves the balancing of policy objectives. A protected, planning level decision involves a question of public policy and the balancing of competing social, political, or economic considerations. Operational decisions, unlike planning level decisions, involve the day-to-day workings of a governmental unit, and these implementation decisions are not protected. (Killen, at 116, citations omitted)
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> Because development of a suicide prevention policy involves questions of public policy and the balancing of competing interests, the development of a suicide prevention policy is a protected discretionary function. . . . The school district did not develop a suicide prevention policy. Discretionary function immunity protects both the development and the nondevelopment of a policy. (Id., citations omitted.)
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> A public official charged by law with duties that call for the exercise of judgment or discretion is not personally liable to an individual for damages unless the official's actions are willful or malicious. This common law official immunity protects an individual's acts that call for the exercise of judgment and discretion. Acts that are nondiscretionary, imperative, or prescribed by policy, are not protected. (Killen, at 117, citations omitted.)

There was a well reasoned dissenting opinion, questioning whether the guidance counselor was entitled to official immunity. The dissent found that the counselor—and the school district vicariously—owed a duty to the student that arose from the "special knowledge of the person's suicidal tendencies," as well as "actual knowledge." Although the school had no control over the student in her home, "it exercised substantial control over her while she was at school." The dissent noted, "While guidance counselors must be afforded some degree of discretion, that discretion is not unbounded and must be cautiously exercised when dealing with possibly suicidal students. Given the special status and protection that the law affords students and the gravity of decisions involving suicidal students, I believe that [the guidance counselor's] failure to notify the [parents] is not entitled to official immunity." Killen, at 118.

5. In Fowler v. Szostek, 905 S.W.2d 336 (Tex. App. 1995), the parents of a student who committed suicide after she was disciplined for selling drugs brought an action against the

school administrators. Summary judgment was granted in favor of the school administrators based upon official immunity.[9]

42 U.S.C. §1983*:* Civil Rights Claims

1. Section 1983 of the Civil Rights Act of 1871 (42 U.S.C. §1983) provides another possible area of liability for schools for student suicides. Damages for violation of a student's constitutional rights can be imposed upon both school corporations and school officials. Wood v. Strickland, 420 U.S. 308 (1975); Monell v. Department of Social Services, 436 U.S. 658 (1978). Section 1983 liability can be imposed upon schools for the sexual abuse of students by school personnel. Finding that students have a constitutional right to bodily integrity protected by the Due Process Clause of the Fourteenth Amendment, courts have held that school personnel may be liable for sexual abuse by a teacher if they knew of the abuse and acted with deliberate indifference by failing to stop it. Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 118 S. Ct. 1989 (1998); Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 989); Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir. 1994), *cert. denied* (1994); Doe v. Rains Independent School District, 865 F.Supp. 375 (E.D.Tex. 1994) rev. and remanded, 66 F.3d 1402 (5th Cir. 1995); and Wilson v. Webb, 869 F.Supp. 496 (W.D.Ky. 1994).

   Applying the theories that have evolved from the sexual abuse cases, in Wyke v. Polk County School Board, 898 F.Supp. 852 (M.D. Fla. 1995), the mother of a 13-year-old student who committed suicide brought a §1983 civil rights suit and wrongful death action based on the failure of school administrators to prevent the student's suicide.[10] Although the facts are somewhat in dispute, it is unquestioned the student attempted suicide at least once at school and perhaps twice. The student attempted to hang himself with his football jersey in a school bathroom at the end of the school day. Another student happened by, interrupting the attempt. The other student informed his mother, who informed the dean of students. The dean talked

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[9]The official immunity and discretionary immunity discussed in the Brooks, Killen and Fowler decisions are based upon state law. Indiana by statute provides for similar discretionary function immunity (I.C. 34-13-3-3) and immunity for public employees acting within the scope of their employment (I.C. 34-13-3-5).

[10]While the court in this case granted the school's motion for a directed verdict on the civil rights claim, the jury returned a verdict in favor of the plaintiff on the state negligence claim. The facts of the case indicated that the student had made two suicide attempts at school and that school personnel had been made aware of these attempts. The jury found that the school was partly responsible for the suicide due to the school's failure to notify the mother of the student's suicidal tendencies. The jury awarded the mother $165,000 in damages. Also see David Hill, "Who's To Blame," *Education Week* (October 19, 1994).

with the student the next day, reading and discussing verses from the Bible. However, he did not inform the student's mother of the suicide attempt and did not inform school administration because of "red tape." The second attempt occurred in a school restroom not far from the school cafeteria. The incident was reported to an administrator, who did nothing further. The student hanged himself from a tree in the backyard of the home where he lived. The §1983 claim required a violation of a constitutional right. The court found that the mother has a constitutionally protected liberty interest in her relationship with her son. "The familial right of association is protected by the liberty interest embodied in the substantive due process element of the Fourteenth Amendment. See Griffin v. Strong, 983 F.2d 1544, 1546-47 (10th Cir. 1993)." Wyke, at 855. Unlike the sexual abuse cases where the injury was imposed by school personnel, this case involved the action by a third party (the student), which caused the injury. Citing DeShaney v. Winnebago County Dep't. Of Social Serv., 489 U.S.189 (1989), the court found "a state's failure to protect an individual against private violence does not constitute a violation of the substantive Due Process Clause." Wyke, at 856.

The court further rejected the mother's argument that a "special relationship" existed creating a constitutional duty on the part of the school to protect her son from committing suicide. "In order to create a special relationship that imposes an affirmative duty on the State to protect an individual, the state must restrain the individual's freedom. See generally Wooten v. Campbell, 49 F.3d 696 (11th Cir. 1995)." Id. Such a duty arises only when the state takes a person into custody which renders the individual unable to care for himself. Estelle v. Gamble, 429 U.S. 97 (1976); Youngberg v. Romeo, 457 U.S. 307 (1982). Further, a state's compulsory attendance law does not create a special relationship between schools and students. D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3rd Cir. 1992), *cert. denied,* 506 U.S. 1079 (1993). "Schoolchildren are not like mental patients and prisoners such that the state has an affirmative duty to protect them." J.O. v. Alton Community Unit School District 11, 909 F.2d 267, 272-73 (7th Cir. 1990).

Both the mother and the school board appealed. In Wyke v. Polk Co. School Board, 129 F.3d 560 (11th Cir. 1997), the Circuit Court of Appeals affirmed the district court's finding that the school did not violate any constitutional rights, but it did have a duty to notify the mother of her son's suicide attempts, which occurred on school grounds and during school hours; failed to hold the student in protective custody; and failed to provide or procure counseling for the student. Although as a general rule one cannot be held liable for the suicide of another absent a custodial relationship, in this case, it was possible for a jury to conclude that the student's suicide was foreseeable, and the school was negligent for not acting affirmatively to guard against it. At 574.

2. In a recent case involving allegations of peer sexual harassment and applying the recent U.S.

Supreme Court decision in Davis v. Monroe County Bd. of Education, 119 S.Ct. 29 (1998)[11], the Tenth Circuit Court of Appeals found that a student stated a cause of action under Title IX for peer sexual harassment as well as a §1983 action against teachers and the principal for violating the student's constitutional rights by refusing to remedy the sexual harassment despite having actual knowledge. Murrell v. School Dist. No. 1, Denver, Co., 186 F.3d 1238 (10th Cir. 1999) involved a high school student with significant disabilities who was subjected to repeated sexual assaults by another student with disabilities. The student had a developmental ability at about a 1st grade level. The other student had a history of assaultive behavior. He was made a "janitor's assistant" as a part of his school-based program. This position provided him access to unsupervised areas of the school, where he took the student on several occasions. A janitor interrupted one such assault, but his response was to tell the students to get back to class. The janitor told the student's teachers of the incident, but no report was made to the student's mother. The student reported another incident to her teachers, but the teachers advised her not to tell her mother. These assaults continued until the student began to engage in self-destructive behavior, including suicide attempts. When the student was hospitalized in a psychiatric hospital, the parent learned of the sexual assaults and batteries that had occurred in the high school. When the parent confronted the school regarding these incidents, the school alleged the contacts may have been consensual, despite the student's inability to form consent. Eventually, the hostile relationship devolved to the point the school suspended the student, but not her attacker. Her attacker actually retained his job as "janitor's assistant" with the same access to all parts of the school as he previously enjoyed. Based upon the Supreme Court's holding in Davis, *supra*, the 10th Circuit found that the school could be liable for peer sexual harassment if it remained deliberately indifferent to acts of harassment of which it had actual knowledge, and that the harassment was so severe, pervasive, and objectively offensive that it deprived the student-victim of access to educational benefits or opportunities offered by the school. The court also found that the complaint of the parent sufficiently alleged that the teachers and principal were deliberately indifferent to the sexual assaults by the student over whom they had supervisory authority. As a result, qualified immunity is not available as a defense to the claims. The 10th Circuit reversed the district court's order dismissing the parent's Title IX and §1983 claims against the individual defendants, but upheld the dismissal of her §1983 equal protection claim against the school district. The matter has been remanded to the district court.

COMMERCIAL FREE SPEECH, PUBLIC SCHOOLS, AND ADVERTISING

(Article by Valerie Hall, Legal Counsel)

[11]See **Quarterly Report** April-June: 1999.

Public school districts across the country increasingly are finding it necessary to find ways to raise money for their overstretched budgets. Permitting advertising in such forums as school newspapers, drama and choral programs, yearbooks, and school baseball field fences are ways to raise money. But this can create a litigation minefield when school administrators, advertisers,

parents and concerned citizens disagree on the contents and the wisdom of permitting such advertising.[12]

Permitting commercial advertising raises First Amendment free speech issues. It becomes increasingly difficult for public school districts to control or restrict the content of certain speech, including commercial speech, when the school district creates a "limited public forum" for certain other types of "speech" by accepting advertising or otherwise granting access to the school and its students. Mere disagreement with the content or viewpoint is not sufficient. There must be involved a compelling governmental interest before such commercial speech can be restricted.

In San Diego Committee Against Registration and the Draft v. The Governing Board of Grossmont Union High School District, 790 F.2d 1471 (9th Cir. 1986), the school board was found to have violated the First Amendment when it excluded from its high school newspaper advertisements from the plaintiffs, an antidraft organization involved in promoting alternatives to compulsory military service. However, the school board did accept advertisements from military recruiters. The court noted that the school board did not have to accept advertisements from any source, but once it did, it created a "limited public forum" that is then generally open to the public even though the school board was not required to create the forum in the first place.

> A limited public forum may, depending on its nature and the nature of the state's actions, be open to the general public for the discussion of all topics, or there may be limitation on the group allowed to use the forums or the topics than can be discussed. Thus a limited public forum may be open to certain groups for the discussion of any topic, or to the entire public for the discussion of certain topics, or some combination of the two. Once the state has created a limited public forum, its ability to impose further constraints on the type of speech permitted in that forum is quite restricted[.] Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id., at 1475, citing to Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983).

The court noted that "speech" for First Amendment purposes can be commercial, political, artistic, or other types. Here, "[t]he Board's admitted policy and practice is to allow members of the general public to avail themselves of the forum [the high school newspaper] as long as their speech consists of

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[12] This article does not address the exclusive sales contracts public school districts are entering into with certain soft drink distributors. These so-called "Cola Wars" do not implicate free speech issues.

advertisements offering goods, services, or vocational opportunities to students. Because the newspapers are open to the entire public for discussion of these limited topics, the Board has also created a limited public forum...." Id., at 1476. The court added at 1478 that although the limited forum for non-students was restricted to commercial speech, commercial speech can also combine elements of political speech as well (in this case, advertisements by military recruiters is not only commercial but political as well because military service is a controversial topic). The court, following U.S. Supreme Court precedent, determined that the school board could not, without a compelling governmental interest, engage in content-based or viewpoint-based discrimination, nor could the school board present only one side of a highly controversial issue (at 1481). "Viewpoint-based discrimination is not permitted even in a nonpublic forum."

The following are similar circumstances where school boards were found to have violated the First Amendment by creating limited public forums and then engaging in content-based or viewpoint-based discrimination with respect to unpopular ideas without a showing of a compelling governmental interest.

1. Clergy and Laity Concerned v. Chicago Board of Education, 586 F.Supp. 1408 (N.D. Ill. 1984). The school board permitted military recruiters to visit schools but denied the same access to antiwar activists. Even though schools are not traditional open forums where viewpoint discrimination is *per se* unconstitutional, many cases have held that the states' obligation of viewpoint neutrality applies to discriminatory access restriction imposed in public schools (at 1413) without justification based upon a substantial state or governmental interest (at 1412). Once the school board, as a governmental entity, creates a forum, it cannot pick and choose which views it feels should be expressed in the forum. "When a restriction has the effect of favoring the expression of a particular point of view, the First Amendment is plainly offended, and such a restriction is subject to strict scrutiny." Id., at 1411.

2. Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989). The school board violated the First Amendment by prohibiting an organization of peace activists from participating in the school board's "career day," which included military recruiters and other employment-related organizations. Citing to Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788. 105 S.Ct. 3439 (1985), the court noted that where government creates a public forum, "the government may enforce content-based restrictions only if necessary to serve a compelling state interest and narrowly tailored to serve that interest.... In a nonpublic forum, however, the government enjoys considerably more power over the use of its property: it may impose content-based restrictions which are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." Id., at 1318. "It is the total banning of a group from the forum—rather than limiting what a group can say—that we find to be unreasonable." Id., at 1322.

> In a nonpublic forum, the government may limit the subject matter discussed by all speakers in a forum but it may not distinguish between particular speakers based on their view of the approved subject matter. [T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.... [O]nce the School Board determines

that certain speech is appropriate for its students, it may not discriminate between speakers who will speak on the topic merely because it disagrees with their views." Id., at 1324.

3. National Socialist White Peoples' Party v. Ringer, 473 F.2d 1010 (4th Cir. 1973). School board had to rent its school auditorium to a racially discriminatory organization because the auditorium was available for use by other private organizations.

Also see Knights of the KKK v. Baton Rouge Parish School Board, 578 F.2d 1122 (5th Cir. 1978); Gay Student Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974); Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969).

Although schools are not traditional public forums, courts have consistently struck down access restrictions when such restrictions are based, in part, on the viewpoints of the speaker's message. "Commercial speech," as noted above can—and often does—involve "political speech." It may also involve religious speech, as discussed below. A recent case on point is a California case involving an attempt to buy advertising space to post the Ten Commandments on a school's baseball field fence. Although there is a dearth of Indiana case law[13], there are sufficient published opinions from other jurisdictions that provide insight and guidance. This article reviews cases regarding commercial free speech as it relates to public schools and advertising. These cases emphasize the need for school administrators to proceed with caution before opening up a forum for advertising.

In DiLoreto v. Downey Unified Sch. Dist. Bd. Of Education, 196 F.3d 958 (9th Cir. 1999), Mr. DiLoreto sued the superintendent of the school district and two members of the Board of Education because the district refused to post his "advertisement" on the school's baseball fence. The school's baseball booster club raised funds by soliciting advertisements from local businesses in exchange for a $400 donation. The advertisement in question contained the text of the Ten Commandments. DiLoreto

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[13] A recent controversy involving a "behavior code" and Scottsburg, Indiana school officials was reported in Education Daily on December 17, 1999. The local superintendent reportedly told *The New York Times* that stronger morals should be taught in school, given the growing incidence of school violence. School officials reportedly recognize that posting the Ten Commandments in their schools would violate the First Amendment, but have proposed eleven "Common Precepts" starting with "Trust in God" taken from "In God We Trust" printed on U.S. currency. The Indiana Civil Liberties Union has reportedly stated that "it suspiciously tracks the Ten Commandments" and "the edict to trust in God is clearly a religious notion." Education Daily, December 17, 1999 at page 2. There were two bills introduced in the 2000 Indiana General Assembly that would permit the display of the Ten Commandments by public schools under certain circumstances. See Senate Bill No. 2 and House Bill No. 1180. HB No. 1180 was passed in the House by a 91–7 count. The Senate amended the bill and passed it on a 40–10 vote. The House concurred with the amended bill by a 90–6 vote. The bill has been forwarded to the Governor.

argued that the school district's refusal to post the advertisement on the school's baseball field fence violated his right to free speech under the First Amendment to the United States Constitution. The school's defense was that posting the sign would have violated the Establishment Clause of the First Amendment, and that it feared the disruption, controversy, and litigation the sign might bring.

The 9th Circuit Court of Appeals held that the school district could exclude subjects from a non-public forum such as a baseball field fence if the message would be disruptive to the educational purpose of the school, and that neither the school district's refusal to post the sign nor its decision to close the forum to all advertising constituted viewpoint discrimination. The court found that the school district's decision to exclude advertisements on certain subjects, including religion, was reasonable given the school district's concerns regarding disruption, controversy and litigation.

In DiLoreto v. Board of Education, 87 Cal. Rptr.2d 791 (Cal.App. 1999), the Los Angeles County Superior Court denied Mr. DiLoreto's separate claims that his free speech rights had been violated under the California Constitution. As did the federal court, the state court ruled in favor of the school district. The state's appellate court affirmed that ruling, rejecting his claim of free speech violation, finding instead that the school district's fence was not a public forum. The court ruled DiLoreto was not free to impose his religious viewpoints on children in the educational arena. If DiLoreto's sign were posted, it would have been in violation of the state's establishment clause (i.e., the school district's duty to not show a preference to any one religion).

Forum analysis is important in determining the outcome of a case. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed2d 794 (1983), is a U.S. Supreme Court case that discusses what constitutes a "public forum." The case involved a teacher union's preferential access to an interschool mail system and teacher mail boxes. A rival union brought a civil rights action under 42 U.S.C. §1983 against the union and the school board, alleging that preferential access to the internal mail system violated the First Amendment and equal protection clause of the Fourteenth Amendment. The issue was whether the First Amendment, applicable to the States by virtue of the Fourteenth Amendment, is violated when a union that has been elected by public school teachers as their exclusive bargaining representative is granted access to a means of communication while such access is denied to a rival union. The court stated that "[t]he existence of a right of access to public property and the standard by which limitations upon such right must be evaluated differ depending on the character of the property at issue." Perry, 460 U.S. at 44.

Perry defines three public forum categories: (1) public; (2) limited public; and (3) non-public. "Public forums" are places that by tradition have been devoted to assembly and debate where "the rights of the State to limit expressive activity are sharply circumscribed." Examples are public streets and parks. In these public forums, the government may not prohibit all "communicative activity." For the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest, and that it is narrowly drawn to achieve that end. The State may enforce restrictions as to time, place, and manner of expression that are content-neutral, narrowly tailored to serve a significant government interest, and leave open alternative channels of communication. Id. A "limited public

forum" consists of ". . . public property which the State has opened for use by the public as a place for expressive activity." The U.S. Constitution forbids a State from enforcing exclusions from a forum generally open to the public even if it were not required to create the forum in the first place. When the State opens up the forum, it is bound by the same standards with regards to restrictions and exclusions as applied to traditional public forums. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to serve a compelling state interest. Perry, 460 U.S. at 46. A "nonpublic forum" consists of public property that is not by tradition or designation a forum for public communication. The First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In addition to time, place and manner restrictions, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not a way to suppress expression merely because public officials oppose the speaker's view. Id. In Perry, the U.S. Supreme Court held that the school mail facilities fell within the "nonpublic forum" category. The Perry case illustrates how forum analysis can affect the outcome of a case.

In Planned Parenthood v. Clark County School Dist., 941 F.2d 817 (9th Cir. 1991), Planned Parenthood submitted advertisements for publications in various high school newspapers, yearbooks and athletic programs in the Clark County, Nevada school district. The advertisements offered gynecological exams, information on birth control methods, pregnancy testing, and pregnancy counseling and referral. School guidelines provided that advertising space would be denied to any entity that did not serve the best interest of the school, district and the community. Principals were allowed to determine whether to accept advertisements. Planned Parenthood's advertisements were rejected. Planned Parenthood filed a 42 U.S.C. §1983 action against the school district for not publishing the advertisements, alleging violation of its First and Fourteenth Amendment rights. The school's justification for not publishing the advertisements was that they wished to avoid the controversy likely to be caused by getting into the pro-life/pro-choice debate by opening their publications to advertisements from both sides, and to avoid "tension and anxiety between teachers and parents." The school district also viewed Planned Parenthood's advertisements as implicating its statutorily prescribed sex education curriculum and sought to avoid conflict with the state requirements regarding the manner in which sex education was to be presented to the students. The Ninth Circuit Court of Appeals held that: (1) the publications at issue were not public forums; (2) schools did not create a limited purpose public forum for advertisers of lawful goods and services; and (3) the school's justification for refusing to publish family planning advertisements was reasonable. In reaching this decision, the court found that school-sponsored publications are nonpublic forums, and that unless the school affirmatively intends to open a forum for indiscriminate use, restrictions reasonably related to the school's mission that are imposed on the content of school-sponsored publications do not violate the First Amendment. Planned Parenthood, 941 F.2d at 819. School facilities may be classified as public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public. If school facilities have been reserved for other intended purposes, "communicative or otherwise," no public forum will have been created and reasonable restrictions on speech may be imposed. Id. at 822. The school's written policies explicitly reserved the right to control content, indicating that newspapers and yearbooks were produced as part of the curriculum. There was no evidence that advertisements

were accepted for a purpose other than to enable the school to raise revenue to finance the publications and impart journalistic management skills to the students. Id. at 824

The 9th Circuit Court of Appeals, in DiLoreto and Planned Parenthood, seems to recognize controversy that may lead to disruption and litigation is a sufficient legal basis for a public school district to restrict advertisements. However, when balanced with the 9th Circuit's San Diego Committee decision, if a public school accepts an advertisement from one "controversial" source, it could not refuse advertisements from another "controversial" source. The legal question left unanswered is what–or who–is to be considered "controversial." Case analysis seems to indicate that controversial actions by the school district itself do not create a forum, limited or otherwise, for outside persons to rebut or otherwise challenge the district's controversial activities through district-sponsored media. This was the situation in Yeo, *infra*.

In Yeo v. Town of Lexington, 131 F.3d 241 (1st Cir. 1997), the parent of public high school students sued the town, members of the town's school committee, school officials and employees under 42 U.S.C. §1983, alleging that the refusal to publish advertisements in the school yearbook and newspaper violated his rights to free speech and equal protection under the U.S. Constitution and Art. 16 of the Massachusetts Declaration of Rights. The Lexington, Massachusetts School Committee adopted a policy of providing condoms to students without parental permission. Mr. Yeo's advertisements urged sexual abstinence. Both publications were student-run and the unwritten policy was to not accept advocacy or political advertising. The student editors decided not to publish the advertisements. Mr. Yeo did not sue the student editors. The defendants moved for summary judgment on various grounds, including the lack of state action, that no public forum had been created, and qualified immunity. The defendants' motion for summary judgment was granted based on the fact that the student editors' decisions in refusing to run the advertisements did not constitute "state action."

TERRORISTIC THREATS

(Article by Dana L. Long, Legal Counsel)

(This is part of the continuing series on school safety issues and the preparation and implemen-tation of emergency preparedness plans by schools.)

Threats of violence, anthrax scares, and bomb threats are increasingly common occurrences in our schools and communities.[14] While the vast majority of these terroristic threats are hoaxes, the publicity surrounding school violence in the past few years has led to increased awareness of and concern for the safety of children in school. Schools and communities are responding to this growing concern by sharing information and resources to prevent violence in schools and to respond appropriately should

[14]The Muncie Star News recently reported a total of 41 bomb threats between April 20, 1999 (the date of the Columbine High School shooting) and December 10, 1999. Fifty percent of these threats were made against schools.

acts of violence occur. State legislatures are enacting new criminal statutes, or increasing penalties for existing crimes, to address more specifically violence and threats of violence in schools.

Constitutionality of Terroristic Threat Statutes

Many states have enacted statutes[15] that criminalize the act of making terroristic threats. A terroristic threat is generally a threat to commit a crime of violence, to cause bodily injury to another person, or to damage the property of another person, and to cause fear or apprehension in another. It is not required that the person making the threat intends to carry out the threat or even has the immediate ability to carry out the threat.[16] A variety of constitutional challenges have been made to these statutes, alleging violations of the First Amendment right to free speech or Fourteenth Amendment due process violations. Most state statutes that criminalize the making of terroristic threats have survived such challenges.

> Masson v. Slaton, 320 F.Supp. 669 (N.D.Ga. 1970): The plaintiff brought an action in federal district court seeking an injunction to prohibit his prosecution in state court for the crime of making a terroristic threat, and also seeking a declaration that the Georgia statute[17] was unconstitutional. The court declined to issue an injunction, finding no special circumstance warranting federal court interference with the state court proceedings. In addressing plaintiff's First Amendment claim, the court determined "[t]he right to free speech is not an unlimited right. It entitles an individual to advocate certain ideas regardless of their popularity, but it does not extend to the threatening of terror, inciting of riots, or placing another's life or property in danger." Id. at 672. In rejecting plaintiff's further challenges to the statute, the court found nothing vague or indefinite in the statutory provisions.

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[15]Most of the state statutes are based, at least in part, on Model Penal Code § 211.3, which provides:

> A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

10 *Uniform Laws Annotated*, Master Edition.

[16]86 *C.J.S.* Threats §14, pp. 533-4.

[17]Ga. Code Ann. § 26-1307 provides, in part:
(a) A person commits a terroristic threat when he threatens to commit any crime of violence, or to burn or damage property, with the purpose of terrorizing another, or of causing the evacuation of a building, place of assembly, or facility of public transportation, or otherwise causing serious public inconvenience. No person shall be convicted under this section on the uncorroborated testimony of the party to whom the threat is communicated.

Lanthrip v. State, 218 S.E.2d 771 (Ga. 1975): The Georgia Supreme Court was asked to examine the constitutionality of the statute under the Fourteenth Amendment. The state's evidence showed the defendant communicated terroristic threats to his wife and his sister-in-law, to kill each of them with a gun. The defendant claimed the statute violated due process rights as it was vague and overly broad. The court found the statute was sufficiently definite to give notice of the proscribed conduct. Further, the statutory provisions did not sweep "within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press . . ." (citations omitted). Id. at 773.

Thomas v. Commonwealth, 574 S.W.2d 903 (Ky.App. 1979): In Thomas, the defendant was convicted of terroristic threatening for making statements threatening to kill his estranged wife if she did not permit him to return home. The defendant challenged his conviction partly on the grounds that the statute was unconstitutionally vague and overbroad.[18] After reviewing cases from other jurisdictions, the court determined that the conduct proscribed was not protected under either the Kentucky or United States Constitutions, and the language of the statute was sufficiently explicit to put the average citizen on notice as to the nature of the conduct so proscribed. The court also found the defendant's assertion that the statute was defective because it did not require an intent to actually convey a serious threat to be ludicrous. Id. at 909.

State v. Gunzelman, 502 P.2d 705 (Kan. 1972):[19] The defendant was in the roofing business and hired employees to drive his roofing trucks. A patrolman issued a ticket to one of the truck drivers for not having a license. The defendant called the patrolman that evening and warned him to quit stopping his trucks. The defendant then went to the patrolman's house, threatened to harm the patrolman or his family when the patrolman was not home at night, and then hit the patrolman. The Kansas Supreme Court upheld the constitutionality of a terroristic threat statute[20] which was based upon §211.3 of the

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[18]KRS 508.080(1)(a) provides:

A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

[19]Reversed and remanded on other grounds.

[20]. . . A terroristic threat is any threat to commit violence communicated with intent to terrorize another, or to cause the evacuation of any building, place of assembly or facility of transportation, or in wanton disregard of the risk of causing such terror or evacuation. K.S.A. 1971 Supp. 21-3419

Model Penal Code. In rejecting the defendant's claim that the statute was vague, the court found that, given the ordinary meaning for the words "threat" and "terrorize," such words could be sufficiently understood by men of common intelligence so as to survive any challenge for vagueness and uncertainty.

Warren v. State, 613 S.W.2d 97 (Ark. 1981): Two county employees were grading a road when the defendant appeared coming out of the nearby woods with a rifle. The defendant ordered them to stop work. When the men got down from the grader, the defendant pointed the rifle and threatened to shoot one of the employees. The defendant argued that the facts of his case might prove assault, but not terroristic threatening,[21] as any threat was for imminent injury and did not create a prolonged state of fear. The court rejected the defendant's argument, finding the language of the statute did not require terrorizing over a prolonged period of time. Further, the court found no constitutional impediment due to the fact the statute may overlap with the provisions of the statute defining assault.

State v. Hamilton, 340 N.W.2d 397 (Neb. 1983): The county attorney brought an action to have the court determine the constitutionality of the state statute prohibiting terroristic threats.[22] The Supreme Court of Nebraska found the statute to be unconstitutionally vague, as it didn't define "threat," nor did it describe how, or to whom, if anyone, the threat must be made.

Indiana Cases

While Indiana does not have a statute specifically addressing "terroristic threats," similar conduct may be prosecuted under statutes concerning false reporting, intimidation, or harassment.[23] In the past few

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[21]Terroristic threatening. (1) A person commits the offense of terroristic threatening if with the purpose [of] terrorizing another person he threatens to cause death or serious physical injury or substantial property damage to another person. Ark.Stat.Ann. § 41-1608 (Rep. 1977).

[22](1) A person commits terroristic threats if:
(a) He threatens to commit any crime likely to result in death or serious physical injury to another person or likely to result in substantial property damage to another person. . . .
Neb.Rev.Stat. § 28-311

[23]Indiana's current criminal code contains the following relevant provisions:

IC 35-44-2-2 (false reporting)
Sec.2. (b) A person who reports, by telephone, telegraph, mail, or other written or oral communication, that:
(1) the person or another person has placed or intends to place an explosive or other destructive substance in a building or transportation facility; . . .
knowing the report to be false commits false reporting, a Class D felony.

years, the Indiana Court of Appeals has had the opportunity to address similar behaviors and provide guidance as to what constitutes "communication of a threat."

> In Gaddis v. State. 680 N.E.2d 860 (Ind.App. 1997): Donald Carver was driving in the far left lane southbound on I–465 near the Indianapolis International Airport when he noticed the Gaddis vehicle approach from the rear. Carver felt that Gaddis was following him too closely, but traffic was too heavy for him to change lanes. When the traffic cleared, Gaddis moved to the far right lane. Carver then moved into the center lane near Gaddis. The two men exchanged hand gestures and spoke to each other, but neither could hear what the other said as

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IC 35-45-2-1 (intimidation)

Sec.1. (a) A person who communicates a threat to another person, with the intent that:

(1) the other person engage in conduct against his will; or

(2) the other person be placed in fear of retaliation for a prior lawful act;

commits intimidation, a Class A misdemeanor.

(b) However, the offense is a:

(1) Class D felony if:

(A) The threat is to commit a forcible felony;

(B) the person to whom the threat is communicated:

. . .

(iv) is an employee of a school corporation; . . . and

(2) Class C felony if, while committing it, the person draws or uses a deadly weapon.

(c) "Threat" means an expression, by words or action, of an intention to:

(1) unlawfully injure the person threatened or another person, or damage property;

(2) unlawfully subject a person to physical confinement or restraint;

(3) commit a crime; . . .

IC 35-45-9-4 (criminal gang intimidation)

Sec.4. A person who threatens another person because the other person:

(1) refuses to join a criminal gang; or

(2) has withdrawn from a criminal gang;

commits criminal gang intimidation, a Class C felony.

I.C. 35-45-2-2 (harassment)

Sec.2. (a) A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication:

. . .

(2) communicates with a person by telegraph, mail, or other form of written communication;

. . .

commits harassment, a Class B misdemeanor.

the windows of both vehicles were raised. Gaddis removed a handgun from his glovebox, displayed it by the window and then placed it near the console. Carver then slowed down, backed off and called the police. Gaddis was subsequently charged with and convicted of intimidation. During the trial, Gaddis testified he was upset that Carver had not moved out of the left lane to allow him to pass. He was also apprehensive because the Carver vehicle had no license plate and he was carrying several thousand dollars worth of jewelry and cash. He thought Carver's gestures were an attempt to force him to pull over or run him off the road. Carver testified that he didn't think Gaddis had any intent of ever shooting and didn't point the gun. The Indiana Court of Appeals determined that a "threat" must contain some evidence of intent to injure. In this case, the mere display of a handgun did not express an intention to unlawfully injure a person or his property.

Ajabu v. State, 677 N.E.2d 1035 (Ind.App. 1997): In a case arising out of a highly publicized murder, the Indiana Court of Appeals found that the definition of "communicate" requires that an individual make a thing known or transmit information to another. In this case, the defendant's son had been charged in the murder of three youth in Carmel. The prosecutor was seeking the death penalty, which the victims' mother supported. Although the defendant didn't speak directly to the prosecutor or the victims' mother, he made a number of statements to newspaper reporters and gave radio and television interviews in which he indicated that others would die if his son received the death penalty. The statements appeared directed to the prosecutor and the mother of the victims. In appealing his conviction of two counts of intimidation, the defendant claimed there was no communication of the threat, as neither of those two individuals were present when the statements were made. The court found the evidence supported the conclusion the defendant used the media to communicate threats that he knew or had reason to know would reach the prosecutor and the victims' mother.

J. T. v. State of Indiana, 718 N.E.2d 1119, 1122 (Ind.App. 1999): J. T., a fifteen-year-old student, was adjudicated a delinquent on the basis of acts which, if committed by an adult, would constitute intimidation and harassment. The student typed a witches' calendar from a book on witchcraft in the school library and sent the document to the printer, located in an area restricted to library staff. The librarian gave the document to the student without comment. A second student, Frank, typed a second document from J. T.'s written notes and dictation, which contained references to human sacrifice and named the villain: Andrea. When Frank went to retrieve this document, the librarian read it and instead turned it in to the school office. J. T. was subsequently suspended from school, and the State filed a petition alleging J. T. to be delinquent. The petition alleged at 1122:

> [J. T.] did communicate a threat to commit a forcible felony to [Andrea], with the intent that [Andrea] be placed in fear of retaliation for a prior lawful act, to wit: choosing not to associate with [J. T.] and/or others and/or engaging in conversation to which [J. T] took offense.
>
> [J. T.] with the intent to harass, annoy, and/or alarm [Andrea], but with no intent of

> legitimate communication, did communicate with a person a letter describing plans to hurt, torture, and brutalize [Andrea].

On appeal, J. T. contended there was no evidence of a communication. The court of appeals determined it was not enough to show that J. T. authored the document, even if it did contain a threat. The communication element of the offenses charged required J. T. to have known, or to have had reason to believe, that the document would reach Andrea. The document was not addressed to Andrea, and the evidence showed J. T. expected the document would be printed and returned to her. "The printing of a single document, without more, does not constitute a communication to the person named in the document." Id. at 1123. In reversing J. T.'s adjudication of delinquency, the court noted at 1124:

> We emphasize that both school and law enforcement authorities are responsible for school security and must respond decisively to any threat of violence. And courts should refrain from second guessing the disciplinary decisions made by school administrators. However, the same facts that would support school discipline may be insufficient as a matter of law to support a true finding based on a criminal statute. The evidence demonstrates that J. T. could not have foreseen that the document would be intercepted and eventually delivered to Andrea. (Citations omitted.)

Student Terroristic Threats

Few reported cases of terroristic threats in schools have yet appeared in the court reporters, due in part to the anonymity that usually accompanies such threats; however such cases are likely to increase as school and law enforcement officials take a more aggressive stance to maintain a school environment free of threats of violence.

Pennsylvania: In April, 1998, three boys and a teacher were waiting in the hallway for a meeting with the principal. As they waited, B. R. indicated he would bring a can of black spray paint to school, paint the camera, destroy the main communications, and bring a gun to school. One of the other boys said he would shoot the principal and line up the teachers and shoot them. The teacher felt the statements were directed to him and felt concerned. In appealing his adjudication of delinquency, B. R. raised the issue:

> Does the terroristic threats statute[24] criminalize statements made by students who were "chit-

[24]Pennsylvania's terroristic threat statute provides that a person is guilty of terroristic threats if the person "threatens to commit any crime of violence with intent to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience." 18 Pa. C.S.A. § 2706.

chatting amongst themselves . . . laughing, joking and carrying on" and who had absolutely no intent to terrorize or to carry out any actions?

In Re B.R., 732 A.2d 633, 636 (Pa.Super. 1999). In affirming the trial court, the Superior Court found that a statement by a student that he would bring a gun to school must be regarded seriously as an attempt to create fear and apprehension, or at least a reckless disregard of the potential to create such fear and apprehension. In reaching its decision, the Superior Court noted the following:

> It is an unfortunate and distressing fact that today teachers and students are many times the victims of violence perpetrated by students. It has been estimated that every day in the United States 6,250 teachers are threatened with violence and 260 teachers are physically assaulted. *See* 86 Journal of Criminal Law and Criminology 1493. Moreover, it has also been estimated that on average four percent of American high school students carry a gun to school at least occasionally. Centers for Disease Control Leads from the Morbidity and Mortality Weekly Report, 266 JAMA 2341 (1991). The Justice Department has noted that about three million thefts and violent crimes happen on or near school campuses each year, an average of one incident every six seconds. The number of juveniles murdered increased by 82% from 1984 to 1994. Each school day about 150,000 students stay home because they fear being shot, stabbed, or beaten, and about 3700 students are in fact the victims of assault daily. Significant numbers of elementary school children also worry about becoming victims of violence. *See* United States Department of Justice. Juvenile Offenders and Victims: 1996 Update on Violence. Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs (OJP). Washington, DC., February 1996.
>
> We are also painfully aware that far too many times within the last two years our nation has mourned as a result of horrific carnage wrought by gun-wielding school students. On December 1, 1997 a 14-year old brought a gun to a school prayer meeting in West Paducah, Kentucky, opened fire and killed three students while wounding five others. On March 24, 1998 in Jonesboro, Arkansas, an 11-year old and a thirteen year old ambushed classmates and teachers assembling outside of the school after a false fire alarm. One teacher and four students were killed while nine students and another teacher were wounded. On April 25, 1998 in Edinboro, Pa., a fourteen year old middle school student shot and killed a teacher and wounded two other students at a school-sponsored dance. On May 21, 1998 a 15 year old student brought a gun to school in Springfield, Oregon and killed two students and wounded twenty-two others. Most recently, on April 20, 1999 at Columbine High School in Colorado, fifteen people perished when two students went on a killing rampage.

In Re B.R., at 638-9.

Michigan: Four boys in Port Huron, Michigan, were arrested in May, 1999, after allegedly planning a massacre similar to that which occurred at Columbine High School. A fourteen-year-old girl overheard some of them talking about a plan to go on a shooting spree in a gym assembly and detonate a bomb afterward to kill the school's "preps."[25] On January 18, 2000, a jury acquitted fourteen-year-old Daniel Fick of conspiracy to commit murder. Fick said that while he and his friends "said some stupid stuff," they weren't serious about planning to shoot classmates. Charges against one of the students were dismissed. The other two students accepted plea agreements which kept them out of jail.[26]

Indiana's Legislative Response

Threats, possession of weapons, discipline, and incivility were topics of a number of bills introduced during the 2000 legislative session. A summary of some of this proposed legislation follows:

Threats

House Bill No. 1041: This bill would make it a Class A misdemeanor for a person, while on or in school property, to knowingly or intentionally: (1) threaten to commit an offense likely to result in death, serious bodily injury, or substantial property damage; or (2) make false statements that cause the evacuation of certain places. The offense would become a Class D felony if it is committed by means of a deadly weapon. This bill did not pass.

House Bill No. 1160: The offense of disorderly conduct would be expanded to include acts of a person who recklessly, knowingly, or intentionally disrupts or interferes with the lawful activity of a school by communicating certain threats relating to a person or property within or associated with the school. This bill did not pass.

House Bill No. 1300: A part of this bill elevates the offense of intimidation from a Class A misdemeanor to a Class D felony for communicating a threat by using school or other governmental property, including electronic equipment or systems. This bill did not pass.

Firearms

Senate Bill No. 34: The penalty for dangerous possession of a firearm would increase from a Class A misdemeanor to a Class D felony. There would be a nonsuspendible period of incarceration. Dangerous possession of a firearm by a child who is less than 16 years of age would be a delinquent act under the exclusive jurisdiction of the juvenile court. (Current law does not address the appropriate jurisdiction for a case involving the dangerous possession of a firearm by a child who is less than 16

[25]Associated Press article as reported by the Bloomington Herald-Times, May 17, 1999.

[26]Associated Press article as reported by the Boston Globe, January 19, 2000.

years of age.) This bill also provides for a minimum period of confinement in a secure facility for violations occurring in a "public safety improvement area" established by the city legislative body in Indianapolis, Fort Wayne,

Evansville, Gary, South Bend, Hammond, Muncie, Bloomington, Anderson, Terre Haute, Kokomo, Lafayette, Elkhart, Mishawaka, Richmond, or New Albany. This bill did not pass.

Senate Bill No. 35: This bill would require a school superintendent to immediately notify law enforcement authorities when a student brings a firearm onto school property or is in possession of a firearm on school property. It provides that the superintendent may give similar notice if a deadly weapon other than a firearm is involved. A law enforcement agency that receives notice from a superintendent would be required to investigate and take appropriate action. This bill would also require the superintendent of a school corporation or equivalent authority of an accredited nonpublic school to notify the state superintendent of public instruction when the administrator knows that a current or former employee with a teacher's license has been convicted of an offense for which a teacher may lose a license. This bill did not pass.

Senate Bill No. 37: This bill would require a school superintendent to immediately notify law enforcement authorities when a student brings a firearm to school property or is in possession of a firearm on school property. It would provide that the superintendent may give similar notice if a deadly weapon other than a firearm is involved. A law enforcement agency that receives notice from a superintendent would be required to investigate and take appropriate action. This bill did not pass.

Student Discipline

Senate Bill No. 159: This bill provides that a student may be suspended or expelled for an activity that is disruptive even if not unlawful. This bill did not pass

House Bill No. 1016: This bill provides that a student may be suspended or expelled for an activity that is disruptive even if not unlawful. This bill did not pass.

House Bill No. 1044: This bill would require a student to use an appropriate respectful term (Ma'am, Sir, Miss, Mrs., Ms., or Mr.) when addressing or responding to a principal, member of the administrative staff, teacher, or other school personnel while on school property or attending a school-sponsored event. A student who does not use a respectful term would be subject to the disciplinary procedures of the school corporation. This bill did not pass.

House Bill No. 1300: Part of this bill would provide that before disciplinary action can be taken against a student by someone other than the student's teacher, or before action can be taken to suspend or expel a student, the student's teacher must be consulted in an advisory capacity. This bill did not pass.

Reporting Crimes

Senate Bill No. 221: This bill would make it a Class C misdemeanor for a person to engage in certain disruptive behavior while in or on school property or while participating in or attending a school-sponsored activity. An employee of a school corporation would be required to report to a school

administrator, and the school administrator report to a law enforcement officer, the commission in, on, or within 1,000 feet of school property of any crime, whether committed by an adult or a juvenile. (Current law requires a school employee or administrator to report only the commission of a violation related to controlled substances or a violation concerning minors and alcoholic beverages.) This bill did not pass.

House Bill No. 1300: A section of this bill would require a school to make a report to local law enforcement officials if a school employee has received a threat or is the victim of intimidation. This bill would also provide immunity for an individual making such a report in good faith. This bill did not pass.

School Safety and School Police Force

House Bill No. 1074: This bill would permit school corporations to maintain as confidential school security plans. It provides that an executive session may be held to discuss the assessment, design, and implementation of school safety and security measures, plans, and systems. It also provides that school safety and security measures, plans, and systems, including emergency preparedness plans, are confidential at the discretion of the public agency. This bill was amended to incorporate language from Senate Bill No. 35, *supra*, to require public school corporations and accredited nonpublic schools to report to the State Superintendent any person possessing a teacher's license who is convicted of certain crimes against children. The bill, as amended, passed unanimously and has been forwarded to the Governor.

House Bill No. 1207: This bill would permit the governing body of a school corporation to establish a school corporation police force that is staffed with police officers who have full police powers and whose survivors are eligible for death benefits. This bill did not pass.

House Bill No. 1375: This bill would establish the school safety reward grant program and fund to promote school safety by rewarding individuals who provide information leading to the arrest of an individual who commits a criminal act while on school property or against an individual who is traveling to or from a school function. A one-year appropriation of $1,500,000 to the fund would be provided. This bill did not pass.

Indiana State Board of Education Initiatives

As noted in **QR** Oct.-Dec.: 98, which began the discussion of the Indiana State Board of Education's rule on safe schools and emergency preparedness planning, 511 IAC 6.1-2-2.5, each school corporation, beginning with the 1999-2000 school year, is required to develop a written emergency preparedness plan for the school corporation and each school in the corporation. This plan must be reviewed and, if necessary, revised each school year. Information on emergency preparedness plans, their development, and other links concerning school safety can be found on the Indiana Department of Education's website at http://www.doe.state.in.us/safeschools/welcome.html. Two sample emergency preparedness plans are provided at http://www.doe.state.in.us/safeschools/sampleplans.html. Included

within these sample plans are useful checklists that schools can use should they receive a threat over the telephone.

(Sample Checklist No. 1)

PLACE THIS SHEET UNDER YOUR TELEPHONE

CALLER'S VOICE:

__ CALM
__ SLOW
__ SOFT
__ CRYING _
__ SLURRED
__ DEEP VOICE
__ NASAL
__ STUTTER
__ CLEARING THROAT
__ DISGUISED
__ DEEP BREATHING_
__ FAMILIAR
__ EXCITED
__ ANGRY
__ RAPID
__ LOUD
__ LAUGHING
__ DISTINCT
__ HIGH VOICE
__ RASPY
__ LISP
__ CRACKING VOICE
__ ACCENT
__ ANGRY

QUESTIONS TO ASK:

1. WHEN IS BOMB GOING TO EXPLODE?
2. WHERE IS IT RIGHT NOW?
3. WHAT DOES IT LOOK LIKE?
4. WHAT KIND OF BOMB IS IT?
5. WHAT WILL CAUSE IT TO EXPLODE?
6. DID YOU PLACE THE BOMB?
7. WHY?
8. WHAT IS YOUR ADDRESS?
9. WHAT IS YOUR NAME?

IF VOICE IS FAMILIAR, WHO DID IT SOUND LIKE?

_____

EXACT WORDING OF THE THREAT:

_____

_____

_____

_____

THREAT LANGUAGE:

__ WELL SPOKEN
__ INCOHERENT
__ EDUCATED
__ FOUL
__ IRRATIONAL
__ TAPED
__ MESSAGE READ BY THREAT MAKER

SEX OF CALLER _____

REMARKS: _____

_____

_____

ETHNICITY_____

AGE ____ LENGTH OF CALL_____

NUMBER AT WHICH CALL IS REC'D _____

BACKGROUND SOUNDS:

__ HOUSE NOISES
__ OFFICE
__ VOICES
__ CHILD
__ ADULT
__ PA SYSTEM
__OFFICE MACHINE
__ ANIMAL NOISES
__ PHONE BOOTH
__ MOTOR
__ STREET NOISES
__ MUSIC
__ FACTORY MACHINES
__ STATIC
__ LONG DISTANCE

TIME _____

DATE _____

__ CLEAR __ LOCAL

(Sample Checklist No. 2)

BOMB THREAT REPORT

(Circle All That Apply)

Calm	Laughing	Adult	Child
Angry	Crying	Raspy	Lisp
Excited	Normal	Deep	Slow
Distinct	Ragged	Rapid	Slurred
Clearing Throat	Soft	Nasal	Accent
Deep Breathing	Loud	Stutter	Cracking
Distinguished	Familiar		

BACKGROUND Noises

Street	Motor	PA System	Music
Machinery	Animal	Phone Booth	Static
Local Call	Cell Phone	House Noises	Talking
Office	Basement	Train	

LANGUAGE

Irrational	Foul	Incoherent	Well Spoken
Reading from a statement	Slang		

School Name _____
Time of Call _____ Date of Call _____
Person Completing Report _____
Daytime Phone _____

COURT JESTERS: WELL VERSED IN THE LAW

British-born poet Percy Bysshe Shelley argued that "Poetry is the record of the best and happiest moments of the happiest and best minds."[27] This is apparently not so where the "record" and the poetry is being made by a judge.

In Busch v. Busch, 732 A.2d 1274 (Pa. Super. 1999), a divorce proceeding, the former husband sought from his former wife distribution of the marital estate along with alimony. However, there was a small problem: He had signed a pre-nuptial agreement that he had proposed prior to their marriage. The former husband had engaged in such an agreement once before in one of his previous marriages. The former wife had never been married before. He sought to have the pre-nuptial agreement declared invalid in part because he failed to read it before he signed it. The trial court was unsympathetic. So was the Pennsylvania Superior Court, who recorded their decision in 27 quatrains of rhyming couplets, written by Judge Mike Eakin.

> No longer living in marital bliss,
> Busch says the judge was reversibly amiss
> for not overturning the pre-nup he signed
> before he and his bride had their lives intertwined.
>
> . . .
>
> A pre-nup's a contract, and the parties are bound
> to honor its terms if disclosure is found
> to include fair recital of what each one's got,
> before it's put into the marital pot.
>
> . . .
>
> Busch wasn't concerned about his fiancee's possessions
> for her knew her precision was near to obsession;
> her summarization would be clear and precise,
> so he chose not to read it, despite counsel's advice.
>
> . . .
>
> The issue is fairness: Were things fully disclosed?
> Clearly her assets were completely exposed,
> so enforcing the contract we cannot prohibit
> for mere want of a staple attaching an exhibit.
>
> . . .
>
> Busch had been married before, so he knew
> what a pre-nuptial contract's intended to do;
> when taking this wife (he'd been wed twice before),
> it's certain appellant knew what was the score.

---

[27] A Defence of Poetry (1821). This sentiment was certainly not autobiographical.

He'd had a pre-nup with his previous wife,
and sought to avoid any mischief or strife
by asking his bride for a pre-nup himself,
to allow her to insulate personal wealth.

They wanted to marry, their lives to enhance,
not for the dollars—it was for romance.
When they said, "I do," had their wedding-day kiss,
it was not about money—only marital bliss.

The trial court, so learned, was led to conclude
that appellant only seeks to undo
that which he wanted back in '84,
a deal which he clearly fancies no more.

But a deal is a deal, if fairly undertaken,
and we find disclosure was fair and unshaken.
Appellant may shun that made once upon a time,
but his appeal must fail, lacking reason (if not rhyme).

The ordeal did not end there. The husband's attorney interpreted literally the last line. He sought reargument before the court by listing reasons—and rhymes—through ten limericks, concluding with:

But before we appeal
I submit this under seal
The discretion was not sound
Compelling reasons abound
Hence, I would like to reargue with zeal.

In a newspaper article,[28] the husband's attorney acknowledged he wrote the limericks alone. "In the event this is not well received, I don't want anyone else to be tainted by it," he joked. Nevertheless, the court denied his motion, fortunately without any further comment. The newspaper article observed that should the versification continue, the state courts may decide not to simply maintain a case file but

[28]"Lawyer Responds To Rhymes With Own Memorable Lines: Reargument Application Written In Verse," provided courtesy David Keller Trevaskis, Esq., Beasley School of Law, Temple University. Mr. Trevaskis has been the primary trainer for Indiana attorneys and school personnel involved in Project PEACE (Peaceful Endings through Attorneys, Children and Educators), a peer mediation training program sponsored by the Indiana State Bar Association and the Office of the Indiana Attorney General, and supported by the Indiana Department of Education. He is known for his odd-ball sense of humor.

may "be tempted to publish an anthology."

QUOTABLE...

"We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government."

> Justice William O. Douglas, dissenting in Osborn v. United States, 385 U.S. 323, 341, 87 S.Ct. 429 (1966). Justice Douglas was commenting on a series of cases involving the government use of agents to pose, infiltrate, or secretly tape record conversations with unsuspecting individuals in order to obtain convictions for certain federal crimes.

UPDATES

First Friday: Public Accommodation of Religious Observances

As noted in **QR** July-September: 1998, the Indiana General Assembly–as has many other states–designates "Good Friday" as a legal holiday, I.C. 1-1-9-1, although public school corporations are not obliged to observe it as such. I.C. 20-10.1-2-4. "Good Friday" is a significant Christian holy day that is central to that faith tradition. It has never become secularized in the manner now associated with other Christian observances, such as Christmas and, to a growing degree, Easter. However, the 9th Circuit (addressing a dispute in Hawaii) and the 6th Circuit (Kentucky) have found that there are now sufficient indices that Good Friday is becoming secularized. When public institutions choose to close on Good Friday, as all State offices do in Indiana, is this in support of a particular religion so as to violate the First Amendment's Establishment Clause? This has been litigated in several states, and continues to be a source of some controversy in Indiana.

1. Bridenbaugh v. O'Bannon, 185 F.3d 796 (7th Cir. 1999) involved a direct challenge to Indiana's law. The federal district court found in favor of the state, and the 7th Circuit Court of Appeals affirmed, although there was a dissent. Although Bridenbaugh did not argue that Indiana's practice of giving state employees a holiday on Good Friday engenders excessive entanglement between church and state, he does argue that the practice lacks a secular justification and has a principal or primary effect of advancing religion. The district court accepted the justification offered by the state: the holiday gives state employees a long spring weekend because there is a four-month span between other scheduled holiday breaks. Holidays, the state argued, "bolster employees' efficiency and morale." At 799. "Indiana," the court noted, "submitted evidence that Good Friday is a good Friday for a long weekend, not only because it falls during a vacation-vacant period, but also because over thirty percent of the

schools in Indiana are closed on Good Friday, and because forty-four percent of employers in a nine-state region, including Indiana, allow their employees to take Good Friday as a holiday." Id. The choice of Good Friday, because of its location on the calendar, is a logical choice for a holiday. Id. The court rejected the plaintiff's assertion that some other Friday or Monday should be used for a spring holiday, primarily because the plaintiff could not show that other days were used by any other school or business. "On this record, then, no other day would be a more reasonable choice to make a long weekend for a spring holiday." Id. Nor did the court believe that Indiana's stated purpose was pretextual or a "sham." Indiana traditionally uses holidays to create long weekends, sometimes by moving some holidays (specifically, Lincoln's and Washington's birthdays) to other positions on the calendar to benefit employees during times that typically involve travel, shopping, cooking, and family gatherings. At 801. The court also found no merit in the argument that, by giving state employees the day off on Good Friday, this makes it easier for such employees to attend church services. "No court has ever held that the Establishment Clause is violated merely because a state holiday has the indirect effect of making it easier for people to practice their faith." At 801-02. In addition, the court added, the State of Indiana "does not celebrate the religious aspects of Good Friday... To Indiana, Good Friday is nothing but a Friday falling in the middle of the long vacationless spring–a day which employees should take off to rejuvenate themselves." At 802.
The dissent felt the state did not provide sufficient justification of a secular purpose. Although the dissent said it would not quarrel with the state had it always designed the first Friday in April for its long spring weekend–and occasionally this fell on Good Friday–but the fact that it is Good Friday every year raises serious questions as to the secular motive. The dissenting judge also noted that the lack of a legislative history (the law was passed in 1941) and the lack of a trial (the district court granted the state's motion for summary judgment) leaves the record fairly thin with respect to how the state reached its decision to use Good Friday for the purpose of a long spring weekend. The U.S. Supreme Court on March 6, 2000, denied certiorari, thus letting stand the 7th Circuit's opinion.

2. Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999) involved a direct challenge by a former teacher to a public school district's observance of a Maryland statute that requires a "public school holiday" to be observed from the Friday before Easter and from then through the Monday after Easter." The public school not only observed this "public school holiday," but also closed on Yom Kippur and Rosh Hashanah, two Jewish holy days, but not for Passover. The teacher complained that she had to use personal leave days or days without pay in order to observe Passover. The school argued that it chose these days because of the high numbers of teachers and students who would be absent from school should it be in session. The district court granted summary judgment, adding that the residual accommodation of religion did not invalidate the statute. The 4th Circuit Court of Appeals affirmed, echoing the district court's analysis. The 4th Circuit also noted that the school board's determination of the school calendar did not depend upon any consultation with any religious group; the school board provided no funding to any religious group; and no preference was demonstrated to the practitioners of any one religion. The plaintiff appealed to the U.S. Supreme Court. On

January 18, 2000, without comment, the Supreme Court declined to review the case.

3. In Granzeier v. Middleton, 173 F.3d 568 (6th Cir. 1999), the 6th Circuit Court of Appeals entertained a challenge to the Good Friday closing of Kenton County, Kentucky, courts. In a 2-1 decision, the 6th Circuit affirmed the federal district court's determination in favor of the county, finding that the "Good Friday" closing was based upon secular reasons–to provide a three-day Spring Holiday. The courts had been closed on Good Friday for a number of years. However, a courthouse official, acting upon the official calendar adopted for 1996, created clip-art with his new computer to advertise to patrons the days when the courthouse would be closed. The Good Friday notice contained a depiction of the Crucifixion. When suit was filed, the county readily admitted the notice was inappropriate, but asserted the posting was not an official action and should not taint the historical reason why the courthouse closed on this date: The day had become secularized to the extent that schools closed, jury pools could not be filled, and families began their spring vacations on this date. Statistics showed that Good Friday has the third heaviest daily traffic volume. 173 F.3d at 571. The 6th Circuit found that Good Friday has become secularized to an extent. A governmental closing on what would be holy days for a particular religion would be suspect "only if the purpose for which they are instituted is religious.... A government practice need not be exclusively secular to survive [constitutional challenge] unless it seems to be a sham...." At 574. In this case, the county articulated credible evidence that Good Friday was chosen as a day to close because "[m]any school children are on Spring vacation the following week, and many Kentucky families start their vacations early, on Friday. Traffic statistics show that highway volume is very high on Good Friday. Courts and government offices do not expect much activity from the public, and the courts worry about the availability of jurors. Furthermore, the policymakers who set the holiday schedules testified that their goal was to provide a break for their employees at that time of year, conveniently scheduled on a day of light activity and proximate to many families' vacations." Id. The majority opinion also recognized that schools will sometimes close on certain days because of the expected high absenteeism, such as schools with a high or moderate Jewish population closing when Yom Kippur and Rosh Hashanah fall on a school day. "Few would argue that any of these practices are done to establish the Jewish religion, but rather as a secular recognition of the practicalities of school or court attendance that might otherwise be disrupted, much as the Friday before the Kentucky Derby is a holiday for schools in the Louisville area, lest attendance be disrupted by observance of a tradition that approaches religious character in the area of this Judge's chambers." At 576. "In short, so long as the finding can be made that there is a significant secular reason for closing on any particular date, a finding that the district judge made in this case and did not err in so finding, the fact that the closing is also convenient for persons of a particular faith does not render the closing unconstitutional." Id. Also see the concurring opinion at 578-79.

Evolution vs. "Creationism"

The U.S. Supreme Court determined that "creation science" (or "creationism") is a religious belief that,

within the context of purportedly providing "balance" in science instruction where the theory of evolution is taught, serves no secular purpose except to advance a peculiar religious belief. Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573 (1987). See **QR** Oct.-Dec.: 1996 and **QR** Oct.-Dec.: 1997. Notwithstanding the Supreme Court's decision, controversy continues.

1. In Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337 (5th Cir. 1999), the Fifth Circuit Court of Appeals affirmed the district court's decision that found unconstitutional the school board's resolution (passed 5-4) that required teachers to read a "disclaimer" prior to teaching the theory of evolution to students. The disclaimer, although ostensibly promoting "critical thinking," was actually promoting "creationism."[29] The resolution read, in pertinent part:

> It is hereby recognized by the Tangipahoa Board of Education that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.

According to the school board, the disclaimer served a three-fold purpose: (1) to encourage informed freedom of belief; (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum; and (3) to reduce offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution. 185 F.3d at 344. The court acknowledged that a school board's articulated purpose should be treated with deference by the court, but "[d]eference...ought not to be confused by blind reliance." Id. The 5th Circuit found that the disclaimer did not encourage "informed freedom of belief." Rather, the disclaimer, "as a whole, furthers a contrary purpose, namely the protection and maintenance of a particular religious viewpoint." At 344-45, 346. The disclaimer does further the second and third purposes, the court found, notwithstanding the infusion of a religious element. Id., at 345. But the defect in the first purpose renders the entire policy unconstitutional. The use of the term "disclaimer" is misleading, the court observed at 346. The disclaimer encourages students "to read and meditate upon religion in general and the 'Biblical version of Creation' in particular." The court allowed that it is not *per se* unconstitutional to introduce religion or religious concepts during school hours, but "there is a fundamental difference between introducing religion and religious concepts in an appropriate study of history, civilization, ethics, comparative religion, or the like, and the reading of the School Board-mandated disclaimer..." Id., at 347, internal punctuation edited. The benefit to religion afforded by the reading of the disclaimer "is more than indirect, remote, or incidental. As such, we conclude that the disclaimer impermissibly advances religion...." At 348. The 5th Circuit also affirmed the award of attorney fees to the plaintiffs. The amount for this disclaimer dispute,

[29]The district court case was reported in **QR** Oct.-Dec.: 1997.

not counting the appeal: $49,444.50.

2. Although there is abundant case law that militates against legislative attempts to insert instruction of "Creation Science" or "Creationism" into the public schools, such endeavors still continue. In the 2000 session of the Indiana General Assembly, the following language was introduced as House Bill No. 1356:

> The governing body of a school corporation may require the teaching of various theories concerning the origin of life, including creation science, within the school corporation.

There does not appear to be a secular purpose inherent in such language, especially where, as here, only one peculiar religious belief–"creation science"–is referenced.

"Fair Share" and Collective Bargaining Agreements

As noted in **QR** January-March: 1997 and **QR** July-September: 1997, the Indiana General Assembly amended I.C. 20-7.5-1-6(a) in 1995 to void any collective bargaining provision that required non-member teachers from paying a "fair share" fee to the organization representing the teachers in a public school district. However, this prohibition applies to contracts bargained after July 1, 1995. As a consequence, there continue to be disputes regarding the requirement to pay "fair share" or other representational costs, calculations of such fees, and whether or not such fees are being used to support political or ideological causes with which the non-member teachers disagree. The U.S. Supreme Court determined in Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 302; 106 S.Ct. 1066, 1073 (1986) that "fair share" allocations to nonmember teachers for the costs of negotiating and administering a collective bargaining agreement are constitutional, but a nonmember cannot be required to subsidize political or ideological activities with which the nonmember disagrees. The "fair share" must be calculated in such a fashion as to ensure the fee is germane to the collective bargaining activity. Where there is a dispute, there must be an independent means for challenging the union's calculation and, where a fee has been collected, an escrow account established to hold the funds until resolution of the proper calculation of the "fair share."

1. The latest case reported in this area is Whitley Co. Teachers Assoc. v. Barber, *et al.*, 718 N.E.2d 1181 (Ind. App. 1999). At issue was a collective bargaining provision in effect before the July 1, 1995, statutory prohibition against "fair share" deductions. In the 1993-1994 school year, the union offered non-members three options with respect to "fair share," the third one permitting an objecting nonmember teacher to withhold payment of a "fair share" until an arbitrator renders a decision. If a nonmember teacher did not select an option, the union automatically placed such teacher in "Option 3," and contacted the American Arbitration Association (AAA) to appoint an arbitrator who would determine "fair share" fees according to the AAA's "Rules for Impartial Determination of Union Fees." At 1185-86. Following

arbitration, the nonmember teachers refused to pay. The union brought suit, but the trial court granted summary judgment for the teachers. On appeal, the Indiana Court of Appeals reversed the trial court. The appellate court reiterated that requiring nonmember teachers to pay a "fair share" is not an unconstitutional infringement on the teachers' First Amendment rights, including their freedom of association. However, a union may only charge a nonmember for those activities that are germane to the collective bargaining process and may not charge for political or ideological expenditures. At 1187. The trial court found against the union because nonmember teachers were required to pay a "fair share" fee in an amount equal to full membership dues, which would include political and ideological expenditures. This, the trial court determined, violated the First Amendment rights of the nonmember teachers. Under Hudson, *supra*, a constitutionally adequate "fair share" collection procedure must have: (1) an adequate explanation of the basis for the fee; (2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker; and (3) an escrow for the amounts reasonably in dispute while such challenges are pending. 475 U.S. at 292.

In reversing the trial court, the Court of Appeals found that the Hudson procedures do not have to be included in any collective bargaining procedure as long as the nonmembers were, in fact, afforded these constitutional protections through appropriate procedures. The union provided nonmember teachers with a packet of information each year that explained the calculation of the "fair share" and offered an opportunity to challenge the calculation. At 1189-90. The appellate court also determined that the financial calculations do not have to be performed through an independent audit, although the court acknowledged that there is some disagreement among the courts of several states as to whether or not–or when–an independent audit is necessary for verification pursuant to Hudson. At 1191-92. The court also found that is was unnecessary for the union to establish an escrow account because, under Option 3, it did not attempt to collect disputed fees until after a determination by the arbitrator. At 1192. The court also rejected the nonmember teachers' challenge to the impartiality of the AAA, citing to previous decisions that found the AAA impartial for this purpose. The fact that arbitrations were conducted during the work week when teachers were reportedly unavailable was likewise unavailing. The teachers admitted that Saturday sessions were held, and that they could have used personal days to attend if they so desired. Also, there is no schedule that would have satisfied all parties. If the arbitrations had been scheduled over a school holiday, "the nonmembers may argue that it interfered with their vacation plans." At 1192-93.

2. The Indiana Court of Appeals, in yet another "Fair Share" case, addressed the effect of the non-code provision of P.L. 199-1995 that amended I.C. 20-7.5-1-6(a). The non-code provision (Sec.2 of P.L. 199-1995) indicates that the law, as amended, "applies to contracts entered into after June 30, 1995." It also provides that this section "expires December 31, 1996." In New Albany-Floyd County Education Assoc. v. Ammerman et al., ____N.E.2d ____ (Ind. App. 2000), a decision released February 10, 2000, the court rejected the arguments of 37 teachers who declined to pay their "fair share" for the 1996-1997 school year because they believed the 1995 amendment voided the "fair share" provision of the local

collective bargaining agreement that was entered into in 1992 and was a multi-year agreement extending at least to December 31, 1996. The court found that Sec. 2 of P.L. 199-1995 was unambiguous. Because the CBA was entered into prior to July 1, 1995, the CBA—and its "fair share" provision—was valid. The dispute was remanded to the trial court to determine when the CBA actually expired. Documentary evidence provided conflicting dates.

Date: _____

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